

2004

Steve Mojica v. Chongqing Bashan Instrument Factory, Inc., Global Health Solutions, Inc., Natural Wellness Network, Inc., O'Currence, Inc., and John Does I-V : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STEVE MOJICA,

Plaintiff/Appellant,

v.

CASE NO. 20041026 - CA

CHONGQING BASHAN INSTRUMENT
FACTORY, INC., GLOBAL HEALTH
SOLUTIONS, INC., NATURAL
WELLNESS NETWORK, INC.,
O'CURRENCE, INC., and JOHN DOES I-V,

Defendants/Appellees.

REPLY BRIEF OF APPELLANT

Appeal from a Judgment of Third Judicial District Court
of Salt Lake County, State of Utah
Honorable Anthony Quinn

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**UTAH COURT OF APPEALS
BRIEF**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
A.	2
THE AE CLEVITE CASE DOES NOT HELP O’CURRANCE	2
B.	3
THE KINNE CASE DOES NOT HELP O’CURRANCE	3
C.	4
THE COMMERCIAL CARRIERS CASE DOES NOT HELP O’CURRANCE	4
CONCLUSION	4
CERTIFICATE OF SERVICE	5

TABLE OF AUTHORITIES

CASES

<i>Ae Clevite, Inc. v. Labor Comm’n</i> , 996 P.2d 1072; 2000 UT App 35	2
<i>Buczynski v. Industrial Comm’n</i> , 934 P.2d 1169 (Utah App. 1997)	3
<i>Comm. Carriers v. Industrial Comm’n</i> , 888 P.2d 707 (Utah App. 1994)	3, 4
<i>Kinne v. Ind. Comm.</i> , 609 P.2d 926 (1980)	3, 4
<i>State Tax Comm’n v. Industrial Comm’n</i> , 685 P.2d 1051 (Utah 1984)	3

SUMMARY OF ARGUMENT

Utah has adopted the “premises” rule in determining whether an employee is on-the-job for workers compensation purposes. While there are limited exceptions to that rule, none of them apply here. Mojica did not have a home office. He did no work at home. He was subject to fixed times of employment. He was not traveling, and his employment had a fixed location. To find that Mojica was acting in the course of his employment while using a product at home to treat himself would expand workers compensation coverage beyond any principled limits.

ARGUMENT

A.

THE AE CLEVITE CASE DOES NOT HELP O’CURRANCE

O’Currence places great reliance on *Ae Clevite, Inc. v. Labor Comm’n*, 996 P.2d 1072; 2000 UT App 35. However, it did not address the critical factual distinctions pointed out Mojica’s appeal brief. Mojica had fixed hours and a fixed place of employment, at O’Currence’s premises, unlike the salesman in *Ae Clevite*. Mojica made no sales calls at home; he was paid hourly for the time he was at O’Currence, but not when he was at home. Unlike *Ae Clevite*, his employer, O’Currence, has a Utah work site, in fact, a very large one. The “home office” rule does not apply to Mojica either. O’Currence has failed to address and distinguish these factual differences.

B.

THE KINNE CASE DOES NOT HELP O'CURRANCE

The case of *Kinne v. Ind. Comm.*, 609 P.2d 926 (1980) does not help O'Curran. O'Curran overlooks the factual distinctions. The employee was driving for his employment, and stopped at home as a layover between his last pickup, and the employer's premises. He was not at home when he was hurt; instead, he was driving to his employer's premises when he was killed.

The Commission . . . found [the employee's] practice was to take the [employer's] tractor to his home, where he cleaned and serviced it to keep it in proper running condition. It was understood that this was [the employee's] responsibility, and it was done with the knowledge of both Kinne and the general manager of Freeport [the two employers]. [The employee] kept the required maintenance tools at his home. On the weekend preceding the accident, [the employee] had taken the tractor home and performed certain required repairs on it, for the benefit of Kinne and Freeport and in accord with the agreement between the two employers. The Commission's conclusion that [the employee] was in the course of his employment at the time of the accident is clearly supported by substantial evidence.

Kinne, at 927. Unlike the *Kinne* case, there is no evidence that O'Curran knew of, benefited from, or agreed to, Mojica's personal research with the heating lamp.

In fact, the *Kinne* case is really like a business trip case, with a brief detour to the employee's home along the way. As noted in Mojica's appeal brief, an employee may also be covered if he is traveling for the employer's benefit. *Comm. Carriers v. Industrial Comm'n*, 888 P.2d 707 (Utah App. 1994)(trucker on long haul engaged in fight to protect load, while resting for the night at truck stop); *Buczynski v. Industrial Comm'n*, 934 P.2d 1169 (Utah App. 1997)(college professor on trip to seminar; compensation denied when injured on "personal lark"); *State Tax Comm'n v. Industrial Comm'n*, 685 P.2d 1051 (Utah 1984)(employee commuting from Brigham City to Salt Lake City for two month work training seminar was in course of employment when injured in auto accident).

But Mojica had merely gone home after work, and was no “traveling employee”.

C.

THE COMMERCIAL CARRIERS CASE DOES NOT HELP O’CURRANCE

O’Currance also cites *Comm. Carriers v. Industrial Comm’n*, 888 P.2d 707 (Utah App. 1994) as a helpful precedent. Actually, this is only another instance of the “traveling employee” rule. In fact, the unlike the employees in *Kinne* or *Ae Clevite*, the long-haul truck driver employee was stopped for the night in a Nebraska motel, apparently far from his personal residence.

CONCLUSION

Utah has consistently followed the “premises” rule, except in certain well-defined situations. O’Currance criticizes the survey of other Utah cases in Mojica’s brief. But because the legal test is so fact-sensitive, it is more helpful to approach the case inductively rather than deductively. From looking at the results of cases in a variety of factual settings, one can draw out the application of general principles more easily than attempting to define them in the abstract. Looking at the various Utah cases applying the course of employment test, the line to be drawn is clear, and it runs around the boundaries of O’Currance’s business site.

The trial court erred when it assumed that Mojica was in the course of his employment simply on the basis that he got hurt while using a medical device he brought home from work. The judgment should be set aside, and the case remanded for further proceedings.

DATED THIS 27th day of April, 2005.

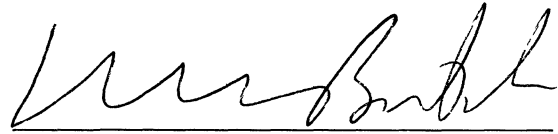
A handwritten signature in black ink, appearing to read "Daniel F. Bertch", written over a horizontal line.

Daniel F. Bertch
Kevin K. Robson

CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of April, 2005, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, and by deposit in first class mail, postage prepaid to the following counsel of record:

Robert L. Stevens
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Salt Lake City, UT 84110-2465

A handwritten signature in black ink, appearing to read "Robert L. Stevens", is written over a horizontal line.